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CHARLES ELMORE

reme Court of the United States

OCTOBER TERM, 1929

No. 457

A STEAMSHIP CORPORATION, WILLIAM H. A. ALKER and FRANK DALY, copartners doing business der the firm name and style of WALKER & DALY,
Petitioners,

—against—

ROBERT CAIN,
Respondent.

PETITIONERS' BRIEF

CARVER W. WOLFE,
Counsel for Petitioners,
No. 27 William Street,
Borough of Manhattan,
New York City.

Higgins & Higgins, Inc., Printers, 43 New Chambers St., N. Y.

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SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. 457.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER & DALY,
Petitioners,

—against—

ROBERT CAIN,
Respondent.

PETITIONERS' BRIEF

Statement

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review judgment affirming judgment of the United States District Court for the Southern District of New York, in favor of the plaintiff,

in an action brought to recover damages for personal injuries.

This is an action at law, brought by the respondent, a fireman on board the American Steamer "ALPHA", owned and operated by petitioners, to recover damages for injuries resulting from an assault alleged to have been committed upon him by the Second Assistant Engineer of the vessel on the morning of February 5th, 1927, while the vessel was lying at Port Amuey, Venezuela. The trial resulted in a judgment for the respondent in the sum of $12,000, which was affirmed by the Circuit Court of Appeals. The opinion of the Circuit Court of Appeals is reported in 35 Fed. (2nd) 717.

This Court granted a writ of certiorari to review this judgment, on December 2nd, 1929.

Pleadings

The complaint contains six causes of action, of which, all but the first and second were dismissed by the Trial Judge and are not here involved. The material allegations of the first cause of action are:

> "*Sixth*: That at the times hereinafter mentioned, one Jackson was in the employ of the defendants as an officer of the said vessel, to wit, the Second As-

sistant Engineer, and that the said Jackson, as such officer, had jurisdiction and authority from the defendants to maintain discipline upon the said vessel, and that he, as such officer, had immediate jurisdiction and authority over the plaintiff.

"*Seventh*: That on or about the 6th day of February, 1927, while the said vessel was in navigable waters in the Republic of Venezuela, South America, the said Jackson, without cause or provocation, violently struck and assaulted the plaintiff, and deliberately and with great force struck plaintiff twice upon the head with a wrench or pipe or other metal instrument, whereby the plaintiff sustained injuries hereinafter set forth.

"*Eighth*: That the act of the said Jackson was done in the exercise of the authority delegated to him by the defendants as aforesaid and was within the scope of his employment and in the course of his duties as said officer of the vessel and for the purpose of enforcing and maintaining the discipline of the vessel; and that the said Jackson was required by the defendants, among his other duties as said officer, to maintain discipline upon said vessel" (2).

The material allegation of the second cause of action is as follows:

"*Twelfth*: That the plaintiff's said injuries were caused by reason of the carelessness and negligence of the defendants in failing to protect the plaintiff from assault by the said Jackson and in failing to exercise care and diligence in preventing such assault although the defendants had knowledge of all the circumstances in ample time so to do" (3).

The answers deny these allegations (6, 7).

The jury disagreed as to the second cause of action (341).

Motion for a new trial was denied in a written opinion by Judge Mack, appearing at page 10 of the Record.

Facts

In view of the finding of the jury, there are no disputed questions of fact involved in this hearing. We quote the facts from the opinion of the Circuit Court of Appeals:

"Cain's testimony is that he started to go down to the engineroom some forty minutes late for his watch; that on the first landing of the stairway he met the first assistant engineer, and became engaged in an altercation with him concerning his tardiness; that he (Cain) retreated to the top of the stairs, and

from there saw the first assistant engineer talk to Jackson, who was the officer on duty in the engineroom; that the latter thereupon proceeded up the stairway toward him. Cain claims Jackson was drunk. What happened when Jackson reached the top of the stairs Cain relates as follows:

"'He told me I was a bit late. I says to him, Yes, I am a bit late, I overslept; and he said, Late be damned; and he says to me and he struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him * * *.'

"Jackson pursued him, saying, 'I will teach you to go down on watch, you bastard.' Cain ran to the captain and reported that he had been struck by Jackson. The captain, however, says that Cain explained later that his wounds were the result of falling on the deck. This was also Jackson's contention. He denied striking any blow whatever. He says the first assistant told him Cain was drunk; that he thereupon went up the stairs to get another fireman; that Cain had his head in the port engine-

> room door, and 'I hollered to him to come on down.' Cain did not obey, and Jackson says that by the time he had reached the top of the stairs, Cain had fallen down and was getting to his feet and starting to run away. He admits that he followed Cain along the deck, shouting to him to stop'' (357).

The case was left to the jury upon the theory that if the second assistant engineer actually struck Cain, not in the course of a private brawl but in the exercise of his authority over him as a superior officer, the defendants would be liable (327).

At the end of plaintiff's case, and again at the end of the defendants' case, proper motions were made to dismiss the complaint, and exceptions taken on the denial of the motions (126, 130, 292).

There was no evidence of any breach of the shipowner's duty to protect the seaman from inhuman treatment, no proof of the previous vicious or notorious character of Jackson, the assaulting officer, and no proof of ratification of the assault by the defendants or the master of the vessel.

This brief will not deal with the question of liability under the so-called Jones Act (Merchant Marine Act of June 5, 1920, 41 Stat. chap. 250, U. S. C. A. Title 46, Sec. 688) as the Circuit Court of Appeals has held the Jones

Act not applicable, and as the specific point is to be determined by this Court in the case of *Inez M. Jamison, et al vs. Valentin Encarnacion*, No. 390, which is to be argued this term.

POINT I.

The Court below erred in holding that the respondent was entitled to indemnity for injuries resulting from an assault committed by a superior officer other than the master, where there was no evidence of any breach of the owner's duty of good treatment and no ratification of the assault, under the General Maritime Law of the United States.

This case presents for determination by this Court, for the first time, the question whether under the general maritime law a vessel owner is liable for indemnity to a seaman for injuries flowing from an assault committed by an officer other than the master, where there is no evidence of the assaulting officer's previous brutal character, no violation of the owner's contractual duty of good treatment, and no evidence of ratification by the master or owner.

The cases below are in conflict, and except for the decision in the instant case, there is no considered review of the subject of the lower

courts. Judge Swan, writing for the Circuit Court of Appeals, referred to such authorities as there are in the following language:

> "Precise authorities are surprisingly few and unconvincing" (362).

but after full consideration held the petitioners liable under the rule *"respondeat superior"*. The learned Judge concluded:

> "While we recognize that the question is not free from doubt, we hold that the shipowner is liable for the willful assault of a subordinate officer acting as such in the ship's business" (365).

As liability was specifically predicated on the rule *"respondeat superior"*, it is necessary to inquire into the extent to which this doctrine applies in the general maritime law of this country in this class of cases. Petitioner contends that whatever the basis of liability for indemnity may be, in cases of injury to seamen, it is not *"respondeat superior"*, although some of the early cases would seem to so indicate.

While many of the lower courts sought to make the injured seaman's rights amphibious, here grounding them on common law doctrines, there anchoring them in the maritime law, it was not until the *Southern Pacific vs. Jensen*, 244 U. S. 205, 61 L. Ed. 1086; and *Chelentis vs. Luckenbach S. S. Co.*, 247 U. S. 372, 62 L.

Ed. 1171; that the exclusive character of the maritime law was finally recognized, and accepted as the sole source of the injured mariner's rights, irrespective of the forum where the suit might be brought. Hence, the early cases such as *The A. Heaton*, 43 Fed. 592; *The Chandos*, 4 Fed. 645; *The Julia Fowler*, 49 Fed. 277, in which liability was based upon common law principles, are now completely discredited. The sole question is whether the *maritime* law imposes liability on shipowners for injuries to seamen by reason of the rule *"respondeat superior"*.

From the earliest times, the injured seaman was entitled in case of illness or injury only to his maintenance and cure, except where the injury resulted from the mariner's own willful misconduct. The fault of the owner or his servants was immaterial as was the negligence of the injured person.

Laws of Oleron, Art. VI, VII;

Laws of Wisbuy, Art. XVIII, XIX;

Laws of Hanse Towns, Art. XXXIX, XLV;

Marine Ordinances of Louis XIV, Bk. 3, Title 4, Art. XI;

City of Alexandria, 17 Fed. 390;

The Osceola, 189 U. S. 158, 47 L. Ed. 760;

Chelentis vs. Luckenbach S. S. Co., supra;

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255, 66 L. Ed. 927.

Under the early codes no indemnity was allowed. In view of the fact that the fault of shipowner and the injured seaman was immaterial, it is obvious that liability of the shipowner was not fixed by the rule of *respondeat superior.*

The allowance of indemnity is an exception to the general rule allowing maintenance and cure, and was so recognized by this Court in *The Osceola, supra.* In that case Mr. Justice Brown stated:

> "It will be observed in these cases that a departure has been made from the continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants Shipping Act of 1876, above quoted, (*Couch vs. Steel,* 3 El. & Bl. 402; *Hedley vs. Pinkney & Sons S. S. Co.,* 7 Asp. M. L. Cas. 135 (1894) A. C. 222) and in this country in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering in-

jury through the unseaworthiness of the vessel" (p. 175).

The learned Justice also recognized that the basis of liability for indemnity arising through injury caused by unseaworthiness of the vessel was not *"respondeat superior"*, but was based on the violation of the owner's contractual duty. He states:

> "Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the Merchants' Shipping Act of 1876 (39 & 40 Vict., Chap. 80, Sec. 5), wherein, in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage." (P. 171.)

The implication in *The Osceola, supra,* was crystallized into a direct statement in *Chelentis vs. Luckenbach S. S. Co., supra.* There the injured seaman brought an action at law to recover indemnity for injuries sustained in consequence of the negligence of the second assistant engineer. Recovery was sought under Section 20 of the *Act of March 4th, 1915,* 38 Stat. 1164, providing:

> "That in any suit to recover damages

> for any injuries sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

This Court in denying indemnity laid down the following rule:

> "But the maritime law imposes upon the shipowner liability to a member of the crew injured at sea by reason of another member's negligence, *without regard to their relationship;* it was of no consequence, therefore, to petitioner whether or not the alleged negligent order came from a fellow-servant; the statute is irrelevant" (384). (Italics ours.)

From this it is clear that "*respondeat superior*" is definitely repudiated as a basis for liability in the maritime law.

It is equally clear that denial of liability beyond maintenance and cure was not postulated on the fellow-servant rule. This latter feature of the opinion was entirely overlooked by the Court below. The purpose of the statute was, of course, to do away with the fellow-servant rule, and had the fellow-servant rule obtained in the maritime law, the statute would unquestionably have accomplished its purpose. But this Court directly negatived its applicability, both as to maintenance and cure and indemnity.

The lower court dealt with this decision in the following language:

"The implication seems to be that the shipowner's liability does not depend on the rule of respondeat superior, but results as an incident of the ownership of the vessel. If the maritime law does not recognize the principle of respondeat superior as applied to negligent acts of a subordinate officer, it is logically consistent to suppose that it does not recognize it as applied to the willful assaults of such an officer. Certain writers on the subject have denied that the common law rule of respondeat superior has received general acceptance in the admiralty. See 19 Harv. Law Rev. 445; 36 Harv. Law Rev. 777. Moreover, the appellants urge, it can scarcely be deemed without significance that in all the early cases the assaulted seaman sued only the master or the subordinate officer who committed the assault. * * *

"While not unmindful of the force of the foregoing arguments, we remain unconvinced that the maritime rule differs from that of the common law in respect to the liability of the employer for willful torts committed by a subordinate officer of a vessel acting within the scope and course of his employment. Admittedly, the principle of respondeat

> superior makes liable the shipowner when the assault is upon a passenger. No reason except the fellow servant doctrine has been advanced for its non-applicability when the assault is upon a seaman, and, as already indicated, that doctrine should not be extended to cover willful torts. We do not believe that the dicta of *The Osceola*, or the implications of the *Chelentis* decision, should be pushed beyond the field of negligence, with which those cases dealt." (pp. 363, 364).

The error which the lower court committed was in assuming that respondeat superior was the basis for liability, and that, in cases, other than those in which the injury was due to unseaworthiness, non-liability for indemnity was due to the fellow-servant rule. We submit that this is an entirely fallacious analysis of the law. *"Respondeat superior"* is not the basis of liability in unseaworthiness cases, the liability there being based on breach of contract, and the non-liability of the shipowner, where the injury was due to negligence of a fellow-seaman, is not a result of the fellow-servant rule *but of the total absence of any principle in the maritime law allowing indemnity in such cases.* The passenger cases, of course, rest on a different basis. We shall advert to the fellow-servant rule *infra.*

If the rule *"respondeat superior"* is applicable at all, it is applicable both to negligence

cases and to willful torts. In *Philadelphia and R. R. Co. vs. Derby*, 14 How. 688, this Court in a common law action for personal injuries, held:

> "The rule 'respondeat superior' or, that the master shall be civilly liable for the tortious acts of his servants, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servants' act or neglect, or if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servants' employment." (P. 486.)

The Circuit Court of Appeals apparently overlooked the full force of this statement. If the *Chelentis* case is correct in holding that "*respondeat superior*" is not applicable in negligence actions as a basis for indemnity, what authority is there, in the maritime law, in view of the statement laid down in *Philadelphia & R. R. Co. vs. Derby*, for holding it applicable in cases of willful torts? It is submitted that there can be no valid line of distinction between the two classes of cases; if applicable in one, it is equally applicable in the other. It would be a most unsatisfactory and illogical law which refused to apply

"respondeat superior" to negligence actions but did apply it to willful acts.

The researches of counsel have been unable to find a single case prior to *The General Rucker*, 35 Fed. 152, where the shipowner was held liable for indemnity for an assault committed by one other than the master. Subsequent to that case there is only one other case holding the shipowner liable under these circumstances, *Memphis & Newport Packet Co. vs. Hill*, 122 Fed. 246. This of itself is evidence of the strongest character that no such liability exists.

The Court, realizing the difficulties of its position, particularly the inconsistency of holding the shipowner liable for a willful assault committed by one other than the master, and yet denying recovery under similar circumstances where the injury was due to negligence, attempted to justify itself by resorting to a sociological appeal. The Court held:

> "Nor is the absence of early authorities recognizing the shipowner's obligation, sufficient evidence that no such obligation exists. The maritime law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions of where loss suffered in the course of a business should fall, should be reflected in the action of the courts, though it result in

> filling pages which history left blank. Absence of precedent did not preclude recognition by the common law courts of the modern view that a principal should answer for the willful torts of his servant committed in the furtherance of his master's business. The principle is equally applicable to the business of shipping, and we find no binding authorities which forbids its application in the maritime law. On the contrary such authority as there is favors it." (pp. 364, 365.)

This appeal to changing economic conditions as a justification for judicial legislation is sociologically moving, but legally unsound. It is the sole function of the Court to declare the law, and not to make it. (*The Lottawanna,* 21 Wall. 576, 22 I. Ed. 662). If the law is unsatisfactory and does not conform with present day ideas of social justice, that is a matter for the conscience of the Legislature.

We contend that the authorities and textbook writers support the following general statement with respect to the liability of shipowners for injuries to seaman.

For violation of any express or implied contractual duties, the injured seaman, under the maritime law, may recover indemnity. The ordinary implied duties of the owner are:

> (1) To furnish a seaworthy vessel and to supply and keep in order the

proper appliances appurtenant to the ship.

The Osceola, supra;

Chelentis vs. Luckenbach S. S. Co., supra;

Carlisle Packing Co., vs. Sandanger, supra.

This includes the obligation (a) to furnish reasonably competent co-employees;

City of Alexandria, supra;

Rio de Janeiro, 130 Fed. 76 (C. C. A. 9th);

The Rolph, 299 Fed. 52, (C. C. A. 9th);

Walker vs. Maitland, 3 B. & Ald. 170;

Holland vs. Seventy Five Tons of Coal, 36 Fed. 785 (D. C.);

Arnold on Marine Insurance (11th Ed.) 938;

(b) to comply with statutory duties as to food, medicines and anti-scorbutics.

The Cyrus, 2 Pet. Adm. 407 (D. C.);

Crouch vs. Steel, 3 E. & B. 402;

Collins vs. Wheeler, 1 Sprague (D. C.) 188;

The Rence, 46 Fed. 805.

(2) To furnish proper maintenance and cure after injury.

The Iroquois, 194 U. S. 240, 48 L. Ed. 955;

The Troop, 118 Fed. 769 (D. C. W. D. Wash. 1902);

Gabrielson vs. Waydell, 67 Fed. 342 (C. C. E. D. N. Y. 1895) reversed on other grounds, 76 Fed. 380;

City of Alexandria, supra.

(3) To protect seamen against indecent and inhuman treatment.

The Eva B. Hall, 114 Fed. 755 (S. D. N. Y. 1902);

The Cuzco, 154 Fed. 177 (C. C. A. 2nd);

The Lizzie Burrill, 115 Fed. 1015 (D. C. Ala. 1902);

The Rolph, supra.

See also Curtis "Rights & Duties of Merchant Seamen", pages 19-28, and 1 Kay on "Shipmasters & Seamen," 574, 575.

Beyond these, we find no authority in the maritime law (aside from the Jones Act) awarding injured seamen indemnity, except as laid down in *The General Rucker, supra* and *Memphis & Newport Packet Co. vs. Hill, supra,* to which we shall advert later.

The error into which the Court below fell, consisted in failing to realize the true basis

for the allowance of indemnity. In *The Osceola*, this Court, after a considered review of the law relating to liability for injuries to seamen, held, p. 175:

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled on the following propositions:
>
> "1. That the vessel and her owners are liable in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wage, at least so long as the voyage is continued.
>
> "2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff vs. Metcalf*, 107 N. Y. 211, 13 N. E. 796.
>
> "3. That all members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the

negligence of another member of the crew, beyond the expense of his maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

Petitioner maintains that these propositions are sufficient to establish the non-liability of the shipowner in the instant case beyond maintenance and cure.

Propositions 1 and 4 state the general rule. Proposition 2 states the exception to the rule. In neither is there any indication whatsoever that *"respondeat superior"* is the basis of liability. In fact, a careful reading of the case shows the reverse.

It is unfortunate that Proposition 3 was inserted in the opinion. It is entirely unnecessary and is pure dictum. As we have shown, the *Chelentis* case completely negatives the application of the fellow-servant rule in admiralty. Long before the fellow-servant rule was evolved, the admiralty courts were satisfactorily deciding cases involving injuries to mariners. The rule originated in England in the common law case of *Priestly vs. Fowler*, 3 M. & W. 1, and was not injected into the maritime law of this country until the case of *Halversen vs. Nisen*,

3 Sawy. 562, Fed. Cas. 5970, and there only common law authorities were cited in support of its application. Its attempted introduction was entirely gratuitous, and served only to confuse the real principles involved. If, as laid down in the *Chelentis* case, the basis of liability is not *"respondeat superior"*, then the fellow-servant rule can have no place in maritime jurisprudence. Petitioner urges that this Court should expressly repudiate the dictum contained in Proposition 3 of *The Osceola* and should take this opportunity of formulating a re-statement in this connection, for the guidance and benefit of the American maritime interests.

Although the opinion in *The Osceola* discusses the question of liability for assault, it is significant that it includes only the liability of the master and not that of the owner. On this point the opinion states:

> "Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence *or otherwise* in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master in personam for an assault committed upon a passenger or seaman. *The Aggincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in General Ad-

miralty Rule 16. * * *" (Italics ours.)

The Court below in commenting on this held:

"Having thus directed its attention to injuries resulting from assaults, it would seem strange for the Court, had it thought an action in personam would lie against the owners, to have ignored this remedy and to have specified only that against the master. Nevertheless, the propositions laid down in *The Osceola* opinion cannot be deemed an absolutely complete statement of an injured seaman's rights against his vessel and her owners, in view of the later decision in *The Iroquois*, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955. There it was held that for negligent treatment of a seaman after he was injured a right to indemnity existed. Moreover, the appellants concede another exception, namely, the seaman's right to indemnity when the master himself commits the assault. Numerous cases in the lower Federal Courts, though not with unanimity as to the propriety of a proceeding in rem, have held the ship or her owners liable to indemnify a seaman assaulted by the master, or by another with the master's acquiescence, or by a subordinate of notoriously brutal temper. In the last instance, when the injuries are inflicted by a notoriously brutal officer, liability

> has been rested upon the duty properly to man the vessel in order to make her seaworthy. • • • We believe, however, that the above cases correctly declare the maritime rule that a shipowner is responsible for injuries to a seaman resulting from an unjustifiable assault by the master, or by another with his acquiesence, committed in furtherance of the ship's business. We conclude, therefore, that *The Osceola* cannot be deemed to have laid down a complete statement of an injured seaman's right to indemnity, and that the question of the defendants' liability in the instant case is open to independent consideration."

Of course, where an unjustified assault is committed by the master, or by another at his direction or with his sanction, the owner is liable for indemnity, for the reason that the master, who is the owner's representative for the furnishing of decent, humane treatment, has violated this contractual duty. *Gabrielson vs. Waydell, supra.* But the basis of the liability is the violation of a contractual duty imposed on the owner by the maritime law and not *"respondeat superior"*. Subordinate officers, however, are not the owner's representatives for the purpose of providing the seaman with decent and humane treatment. Hence, an unjustified assault by one other than the master, where the master was not a party to the assault and could not prevent it, does

not give rise to liability on the theory of a violation of the owner's contractual duty. *The Iroquois*, to which the lower court adverted, was likewise not based on matters connected with the navigation and management of the vessel, but again was concerned with liability arising out of the contractual obligation of the shipowner. The Court below did not allude to any other maritime decisions, except *The General Rucker* and *Memphis & Newport Packet Co. vs. Hill*, where a different rule was laid down than that contained in *The Osceola*. We, therefore, urge that the Court below failed to distinguish between the different grounds of liability, and erred in failing to hold that *The Osceola* governed the case. There are numerous instances where the seaman may recover indemnity for violation of the contractual obligation, and we do not contend that *The Osceola*, as to these matters, is exclusive.

Furthermore, the Circuit Court of Appeals recognized that:

> "No case has been cited which extends this theory of liability to the acts of a subordinate officer committed outside the presence of the master. We pass without decision the question whether this theory is necessarily so limited, for it is not upon this theory but upon the theory of respondeat superior, that the plaintiff relies to sustain his right to recover." (p. 361.)

We now turn to the discussion of the cases

involving actual assault. From Appendix "A", which is a complete list of Federal decisions, so far as we have been able to compile them, covering suits for assaults, it appears that prior to *Spencer vs. Kelley*, 32 Fed. 838, with the exception of *Ringgold vs. Crocker*, Fed. Cas. 11843, the suit was always brought against the master or the assaulting officer. This is some indication that the maritime bar were not of opinion that the owner was liable. Subsequent to this case we have only found three cases where no violation of the owner's contractual duty of good treatment was involved. They are *The General Rucker, supra; Memphis & Newport Packet Co. vs. Hill, supra; Fein vs. U. S.*, 1925 A. M. C. 552.

In *The General Rucker, supra,* the question was whether the vessel owner was liable for an assault committed by the mate upon a roustabout. The Court held:

> "It is not at all necessary to consider here the question of whether a court of admiralty proceeds against the owner of a vessel upon distinct grounds of its own growing out of the peculiar relation that exists between the owner and those engaged about navigating a vessel of commerce, in cases like this, or only enforces the ordinary common law principles of master and servant; *for it is conceded by the learned counsel that the defendant is liable under the common law principle, and to that extent certain-*

ly; and I find no difficulty in adjudging that this case falls clearly within that principle." (Italics ours.)

After adverting to common law cases, such as *Railroad Co. vs. Derby,* 14 How. 468, the Court proceeds:

> "But, after all, this case falls, in my judgment, within the Tennessee rule of liability" (157).

Accordingly, the case only stands for the proposition that under the *common law* of Tennessee the employer is liable for a willful assault committed by the mate of the vessel.

The next case where the vessel owner was held liable for assault committed by a superior officer other than the master, is that of *Memphis & Newport Packet Co. vs. Hill, supra.* There, the vessel owner was held liable for an assault committed by the captain of the watch, who was placed in charge of loading the vessel by the mate, who was acting as the master of the vessel. It was argued by the vessel owner that there was no liability under the fellow-servant rule. The Court stated in its opinion:

> "These cases, to which our attention s especially invited, enunciate nothing nore than the familiar doctrine of the common law that where two persons stand to each other in the relation of fellow servants of a common master,

neither can hold the master responsible for injuries sustained in consequence of the negligent act of the other. But this doctrine, we think, has no application to the case in hand. The injuries complained of by the libellant were not occasioned by the negligent act of Wright, while he and the libellant were working side by side as fellow servants, but they were willfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that office had the same power to give orders to the deckhands and direct them what to do as the mate. It has been held, and we think with good reason, that where a deckhand is thus selected by the master or mate to act as captain of the watch and to exercise authority and control over other deckhands, he is for the time being an officer of the vessel or steamer, within the fair meaning and intent of Section 5347 of the Revised Statutes (U. S. Comp. Stat. 101, p. 6331) which makes it a crime for an officer of an American vessel to willfully beat or wound a member of the crew without just cause (*U. S. vs. Trice* (D. C.) 30 Fed. 490). It is also a well-known rule of law that a master is responsible for willful assault or trespass, such as the one complained of in the present

instance, that is committed by his servant while the latter is immediately engaged in doing the work of the master, and is discharging those duties of the master that have been devolved upon him. (*Philadelphia & Reading R. R. Co. vs. Derby,* 14 How. 468, 486, 14 L. Ed. 502, Am. & Eng. Encyc. of Law, 2nd Ed. Vol. 2, p. 990, and cases there cited.

"If the mate of the steamer *Orlando,* while urging the crew to do their work more rapidly, had inflicted the blow which broke the libellant's arm, without just cause, the owners of the steamer would doubtless have been liable for the tort (*The General Rucker,* (D. C.) 35 Fed. 152, 157, 158; and no good reason is perceived why the owner of the steamer should not be held liable for the same wrongful act when committed by one who at the time of the assault, at the direction of the mate, who was acting as master, was exercising the authority of the mate and was for the time being an officer. It is doubtless true that a master cannot be held liable for a willful assault which one of his servants commits upon another when they are working together as fellow-servants; but if such an assault is committed when, as in the present instance, the one who commits the assault is exercising over the other all the power and authority of master and is so doing by

his appointment, we know of no reason why the master should escape liability because on some occasions the two men worked side by side as fellow-servants.' (pp. 247, 248.)

There is no discussion as to whether the maritime law differs from the common law and while it is not so specifically stated in the opinion, it is apparent that the case was decided on the common law of Tennessee. This decision was handed down about five weeks after *The Osceola* decision. Apparently, the Circuit Court of Appeals was not cognizant of that opinion, for it is not referred to. The Court recognized the common law doctrine of non-liability of the employer for assaults committed by fellow-servants, but held that the assaulting officer, namely, the captain of the watch, was not a fellow-servant. If this Court still adheres to the fellow-servant rule in admiralty, then this decision is specifically overruled by Proposition 3 in *The Osceola*. If, on the other hand, this Court repudiates the fellow-servant doctrine in admiralty, then, of course this case is equally incorrect.

In *Fein vs. United States, supra,* an action was brought by a seaman to recover damages for an assault committed by an officer. The Court held:

"I will not discuss the liability of the ship because of the understanding I have that the ship is not liable unless it ha

failed to use due care and precaution in making the ship seaworthy,—that is, in respect to employing careful and capable officers, and officers that will conduct the business abroad thereof according to law and the rules and regulations of the Department. So that the ship itself must be relieved of any liability."

While the Court used the term "ship", it must be interpreted to mean shipowner, as the suit was in personam. This latter case we think correctly states the law, although it was repudiated by the Court below.

It is, therefore, respectfully submitted that the Court below was in error in holding the petitioner liable for indemnity, both on reason and authority, for injuries sustained by the respondent.

POINT II.

The opinion below improperly construed the so-called Corporal Punishment Statute, Title 46, Section 712, U. S. C. A., R. S. Sec. 4611; Dec. 21, 1898, Chap. 28, Sec. 22, 30 Stat. 761; March 4, 1915, Chap. 153, Sec. 9, 38 Stat. 1167.

This statute provides as follows:

"712. *Corporal punishment.* Flogg-

ing and all other forms of corporal punishment are prohibited on board of any vessel and no form of corporal punishment on board of any vessel shall be deemed justifiable, and any master or other officers thereof who shall violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, punishable by imprisonment for not less than three months nor more than two years. Whenever any officer other than the master of such vessel shall violate any provision of this section, it shall be the duty of such master to surrender such officer to the proper authorities as soon as practicable, provided he has actual knowledge of the misdemeanor, or complaint thereof is made within three days after reaching port. Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages for such flogging or corporal punishment to the person illegally punished by such officer. (R. R. Sec. 4611; Dec. 21, 1898, c. 28, Sec. 22, 30 Stat. 761; Mar. 4, 1915, c. 153, Sec. 9, 38 Stat. 1167)."

On this feature the opinion of the Court below was:

"The statute creates a new ground of liability against the master, and the declaration that ship or owner are also liable may have been inserted to preclude the contrary inference which might have been drawn had the master's liability alone been mentioned."

We think this is a strained construction of the Act. If, as the opinion below indicates, the shipowner is already under an existing liability under the doctrine respondeat superior, where an assault is committed by one other than the master, then so much of this Statute as imposes liability on the shipowner is a mere useless gesture. If any speculation as to why Congress inserted a provision making the owner or vessel liable is to be indulged in, it would seem to be the reverse of that drawn by the Circuit Court of Appeals. Certainly the words of the Statute are plain and we think the intention of Congress was to provide a remedy against the owners in view of the previous non-liability under the General Maritime Law.

In the one case which we have been able to find, where this section was involved, *The Blakeley*, 234 Fed. 959, Judge Neterer was under the impression that the purpose of the act was to give a right of action where none existed before, for he said:

"The intent of the act was to give the

assaulted seaman the right to recover fo
injury."

It is to be observed that the statute di
not create a right of recovery for a willful as
sault *per se*, but only for an assault committe
by way of flogging or corporal punishmen
Consequently, the assault in the case at ba
comes within the terms of this statute. Ther
can be no liabiliy under the statute becaus
there was no proof that the assaulting office
had escaped, which under the terms of th
statute is the condition precedent to recover

If there was an existing liability against th
shipowner at the time this statute was passe
then the statute is so much verbiage and
mere idle gesture on the part of Congres
It is petitioner's contention that this statut
was passed to provide a remedy where non
before existed, and that the Circuit Court o
Appeals erred in failing to so hold.

POINT III.

Even assuming the doctrine of respondeat superior is applicable under the General Maritime Law in cases involving personal injuries, the circumstances under which the assault occurred are such as to bring the facts within the rule laid down in Davis vs. Green, 260 U. S. 349.

The facts in *Davis vs. Green, supra*, taken from the decision of the Supreme Court of Mississippi, 125 Miss. 476, are as follows:

Green, the conductor of a train, was in charge of a switch crew, and the engineer was in charge of switching cars from one point in the railroad yard to another point. It was the duty of the conductor to move the switch in the absence of the switchmen. The engineer and the switchman engaged in an altercation as a result of which the switchman left his post. The engineer then proceeded to move his engine along his route and the engineer and conductor engaged in an argument as to why the conductor had not thrown the switch. The engineer descended from his cab, and, as the Supreme Court of Alabama describes it,

> "with his pistol took his stand in front of the engine, and as Green, the conduc-

> tor, and foreman came up accosted him with this remark: 'Why in the hell have you not thrown the switch?'"

The engineer thereupon shot the conductor. The Supreme Court of Alabama held this act came within the course of the engineer's employment. This Court, speaking through Mr. Justice Holmes, in reversing the Supreme Court of Alabama, said:

> "But neither the allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and willful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a willful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies."

In the instant case, the engineer left his place of employment, the engine room (fols. 219-222) and engaged in an argument over the respondent's coming late on watch, as a result

of which the assault occurred. If the assault in *Davis vs. Green* was not in furtherance of the master's business, it seems to us that the assault here was likewise not in furtherance of the master's business. It was as Justice Holmes so aptly remarked: "A willful act wholly outside the scope of his employment while his employment was going on." Hence we respectfully urge that the Court below adopted a mistaken view of the decision.

CONCLUSION

The judgment should be reversed and the complaint dismissed.

CARVER W. WOLFE,
Counsel for Petitioners.

APPENDIX

DIGEST OF FEDERAL CASES INVOLVING ASSAULTS WITH BRIEF COMMENTS THEREON.

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DIGEST OF FEDERAL CASES INVOLVING ASSAULTS WITH BRIEF COMMENTS THEREON.

In *Anderson vs. Ross*, 2 Sawy. 91, Fed. Cas. No. 361, the Master of the vessel was held liable for injury to a member of the crew caused by an assault committed by the Second Mate in the Master's presence. The Court said:

> "I consider it of much importance that masters should feel it to be as much their duty to restrain the violence of the officers as it is to repress the insubordination of the men, and they will be held responsible if they fail to do their utmost to protect the men from the outrages on the part of the inferior officers, which have so often brought disgrace upon our mercantile marine."

In *Backstack vs. Banks*, Fed. Cas. No. 711, the mate was held liable for an assault upon a seaman.

In *Butler vs. McClellen*, Fed. Cas. 2242; 1 War. 219, libel was filed against the Master

and Mate for an assault committed by the Master and the mate acting under the Master's instructions. The Court dismissed the libel as against the Mate on the theory that the Mate was acting under the express instructions of the Master, but held the Master liable for the assault.

In *Foye vs. Lecki*, Fed. Cas. 5023; 1 Spr. 210, the Master was held liable for unlawful imprisonment of the second mate.

In *Gardiner vs. Bibbins, et al.*, Fed. Cas. 5222, the Master was held liable for an unjustifiable imprisonment of a seaman.

In *Hansen vs. Fowle*, Fed. Cas. No. 6042, the Master was held liable for an unjustifiable assult committed by an officer upon a member of the crew with his connivance, consent and authority.

In *Morris vs. Cornell*, Fed. Cas. 9829, 1 Spr. 62, Master was held liable for an unjustifiable assault upon the second mate, arising out of the mate's insubordination.

In *Payne vs. Allen*, Fed. Cas. 10855 1 Spr. 304, the Master was held liable for an unjustifiable assault committed by him on a seaman.

In *Ringgold vs. Crocker*, Fed. Cas. 11843; 1 Abb. Adm. 344, suit was brought against the owners to recover for injuries caused by an assault committed by the mate. It was assumed by both parties that the limit of recovery was

maintenance and cure, and no attempt was made to secure indemnity. In holding the owners liable for maintenance and cure, Judge Betts stated:

> "A sailor must, in judgment of law, be deemed in the service of the ship, whilst under the power and authority of its officers, and an injury received by him in executing an improper order, or inflicted on him directly, by the wrongful violence of the officer in the exercise of his rightful power and command over him as an officer, must equally entitle him to this privilege secured him by the law maritime.
>
> The ancient sea ordinance, which provided that mariners falling sick during the voyage or hurt in the performance of their duty, should be cured at the expense of the ship. (*Curtis Merchant Seamen*, 106, Note 2)."

This is the first case which we have been able to find where the owner was made a party in an assault action. It is undoubtedly correct.

In *Sheridan vs. Furber*, Fed. Cas. No. 12761, the mate was held liable for an assault committed by orders of the master.

In *Thomas vs. Lane*, Fed. Cas. 13902, the master and mate were held liable for an assault committed by a seaman in his presence.

In this latter case, Mr. Justice Story said:

"The Master has the supreme authority on board of his ship; and has moreover a sort of parental responsibility and duty devolved upon him for the due exercise of it. It is his duty to prevent, as far as he may, any undue exercise of authority by his subordinate officers, and any abuses, injuries and trespasses by them. If he is present when any of the subordinate officers inflict chastisement upon the crew, he is bound in duty to interfere and restrain it, if it is improper in its nature or character, or unjustifiable under the circumstances. If he may interfere, and he does not, he must be deemed to assent and to encourage it; for no officer in his presence has any right to inflict punishment without his assent or direction, unless upon an emergency which admits of no delay. It is not sufficient for him to excuse himself from this interposition, upon any notion of courtesy, or of upholding the authority of the officers, or of supporting the harmony and discipline of the ship. The law has entrusted him with summary powers for the good, not of the officers alone, but of the crew also, and, indeed, for the general good of the maritime service, in which he is engaged. While he should uphold the just discipline of the ship with a steady con-

fidence, he is to take care that the crew is not made victims of the insolence, the passions or the caprice of the officers under him. If he will stand by and see the seamen cruelly, brutally and unjustifiably beaten, without interference, he ought not to complain that the law forces upon him the conclusion that he approves of what is done and means to encourage it by his license and authority. He becomes thereby the abettor and supporter of the deed, upon the reasonable ground that he who knowingly allows oppression, shares the crime."

This latter quotation was approved in the case of *Hansen vs. Fowle, supra.*

In *Murray vs. White, et al.*, 9 Fed. 562, (D. C. Maine, 1881) the master and mate of a vessel were held liable for an unjustified assault committed by the mate in the presence of the master.

In *Riley vs. Allen*, 23 Fed. 46, (D. C. Tennessee, 1885), suit was brought *in personam* against the officers and owners of a steamboat for an assault committed by the mate. It is impossible to tell from the opinion whether the owners were held liable. Certainly the officers were. If the headnote means anything, the decree was only against the officers.

Spencer vs. Kelley, 32 Fed. 888 (C. C. Ohio, 1887) is the first case we have been able to find

where the owner alone was sued for indemnity in an assault case. There the assault was committed by the master. Judge Welker, in instructing the jury, charged as follows:

> "If this injury had been done by the carelessness of the co-laborers of this plaintiff, working in the same capacity as the plaintiff was, the owner of the vessel would not be liable; but for any negligence, or carelessness, or injury inflicted upon subordinates by the master of the vessel, who had the right to control it, the owner of the vessel would be responsible (p. 839). * * This defendant, personally, had nothing to do with this transaction, but he is liable for same because of the acts of his master on board the vessel. He is not liable for every act that the master may do on board of his vessel; but I direct you that, to make the defendant liable for the conduct of the master of his vessel, it must be shown that in the infliction of the injury complained of in this case, the master was acting within the scope of his duties as such master and in the exercise of his control over the plaintiff on that occasion (839). * * * But if enough time elapsed between the two (assaults), so as to show that the assault made outside on the deck was made by way of punishment on the part of the master for disobedience occurring before

and when there was no necessity for it, I direct you, in that respect, that, although the master would be liable, yet the owners of the vessel would not be liable for such action and this injury" (p. 840).

The next case is *The General Rucker*, 35 Fed. 152, (D. C. Tennessee, 1888). There the owner was held liable for an assault committed by the mate on a seaman while loading the vessel. This is the first case we have found where the owner has been held liable. The decision, however, was based on the common law of Tennessee. The Court said:

"But after all, this case falls, in my judgment within the Tennessee rule of liability; and it is always more a question of its application to the particular circumstances than a question of the extent of that rule in imposing liability. What I hold here is that a roustabout, employed in loading the vessel under the command of the mate, who is wounded by the blows of the mate, given because he does not obey his orders, can recover for the injury against the owner, because that business about which they are both engaged is within the scope of the master's employment, and clearly so. If it were not, the rule of the liability of the master for the willful torts of his servant while thus engaged would

be substantially abrogated" (pp. 157, 158).

The Court took occasion to state that the mate had a bad reputation; that he had been arrested for similar offenses three times before, and that the defendant, when employing him, warned the mate against abusive treatment. If the basis for liability in this case was the employment by the owner of a notoriously brutal mate, with knowledge, the case is correct. But if it rests on the common law of Tennessee, it, of course, has no binding force.

The case was followed in *Memphis Packet Co. vs. Hill and The Vueltajabo, infra.*

In *Cole vs. Tollison, et al.*, 40 Fed. 303, (D. C. South Carolina, 1889), a libel was filed against the master and mate for assault committed by the mate. In discussing whether an order of arrest should issue without libellant furnishing security, Judge Simonton said, in denying the order of arrest:

"The libel does not say whether the master witnessed it or not. Now, if we assume that these statements are all true, that the master was on deck, and that he saw the blows struck, there is no evidence that he was aware of the intention of the mate to assault the libellant, or that he could have prevented it; so he cannot be held liable for the assault and battery. The assault was mo-

mentary and there was no need for further interference. The case does not come within *U. S. vs. Taylor*, 2 Sumn. 584; *Murray vs. White*, 9 Fed. 562" (p. 304).

In *Padmore vs. Piltz*, 44 Fed. 104, (D. C. Washington, 1890) Judge Hanford held the master of the vessel liable for assaulting the libellant with a belaying pin.

In *Mellor vs. Cox*, 45 Fed. 115, (D. C. South Carolina, 1891), the master was sued for an assault committed by the mate before the master could interfere. It was held that the master was not liable under these circumstances.

In *Gabrielson vs. Waydell*, 67 Fed. 342 (E. D., N. Y. 1895), the owners of the vessel were held liable for an assault on a seaman committed by the master. This was an action at law, and the opinion was rendered on a motion in arrest of judgment. Judge Wheeler said:

"The principal question in this case is whether the defendants, as owners of the bark 'Rebecca Caruana' are liable to the plaintiff, a seaman, for injuries violently done to him, when sick, by the master, on the high seas. The plaintiff brought suit in the courts of the State for the same injuries, and a judgment in his favor was reversed by the Court of Appeals as not maintainable against the defendants. *Gabrielson vs. Waydell*, 135 N. Y. 1, 31 N. E. 969."

After holding that the judgment in the State Court was not a judgment on the merits, as after the reversal by the Court of Appeals a default judgment was taken by the defendant for costs, the Court proceeded:

> "If in any case an agent could represent the principal about the treatment of a servant, a shipmaster would seem to represent the owners about the treatment of the seamen. * * * * * To wrongfully make a seaman sick or sicker, would seem to be as much of a breach of the duty to cure as wrongful neglect to cure in existing sickness would be. * * * * While the master is in some sense an officer and is often referred to as such in authorities and cases of the sea, he is appointed to his place solely by the owners, and what is called his official capacity seems to be only the large scope of authority going with the appointment from the policy and necessities of the case. By whatever name the authority of the master may be known, it appears to come from the owner. That cases were not brought by seamen for acts done under this authority, shows the understanding of the profession, which is of great weight, but does not show what would have been done with them if they had been brought. Actions upon the liability of principals for acts done by agents placed over others

are of comparatively modern origin, although the principals underlying them are fundamental; and these principles may have slept, for want of being brought into application, as well in this class of cases as in others" (pp. 343, 344, 345).

The case was reversed on other grounds in 76 Fed. 380.

The decision was specifically based on *Railway Co. vs. Ross*, 112 U. S. 377, which case was formally overruled by the Supreme Court in *Railroad Co. vs. Conroy*, 175 U. S. 323.

Of course, this case is correct. The basis of liability was the breach of the duty of good treatment by the master of the vessel, and was so held on appeal.

The Court of Appeals in the action between the same parties in the State court, held, with dissent:

"We find that for an injury resulting to an employee from the willful neglect, or tortious act of another, who is engaged in a common employment with him, the master is not liable at the suit of the injured employee."

Gabrielson vs. Waydell, 135 N. Y. 1, 10.

In *The Miami*, 78 Fed. 818 (D. C., S. D.

Alabama, 1896), an action *in rem* by a stowaway to recover for assault by the master, Judge Toulmin held:

> "The facts alleged show it to be a case of assault and battery by the master. It appears from them that the master intentionally inflicted unlawful violence upon the libellant. This is assault and battery. *The Lord Derby*, 17 Fed. 265. This suit cannot be maintained against the vessel. Admiralty Rule 16" (p. 819).

In *The Marion Chilcott*, 95 Fed. 688, (N. D., Washington, 1899), libel was filed against the vessel to recover charges for an assault committed by an officer of the vessel. The Court held the assaults were committed in violation of the duty of the master to protect the crew from brutal treatment. At page 689, Judge Hanford held:

> "But I hold that the vessel is liable in this case for the consequences of abusive treatment on the part of the first mate, which should have been prevented by the captain. It was the duty of the captain to maintain proper discipline on the ship, and to protect members of the crew from abuse at the hands of his subordinate officers; and neglect to perform his duty in that respect renders the ship liable for the effect of such abuse."

Here again the basis of the decision is the failure of the master to protect the seamen.

Following this came *Olsen vs. Oregon Coal & Navigation Co.*, 96 Fed. 109 (aff'd 104 Fed. 574), (C. C. A. 9th, 1900.) In the lower court, Judge Ross held:

"It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to the seaman, such, for instance, as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, the supplying of the crew with sufficient food and with medical attendance and care in case of injury or sickness, and for his neglect in any of these particulars the owner is liable. The cases of *Gabrielson vs. Waydell*, (C. C. 67 Fed. 342; *The A. Heaton* (C. C. 43 Fed. 592; *Anderson vs. The Rence*, 14 Sawy. 476, 46 Fed. 805; and *The Chandos*, 6 Sawy. 546, 4 Fed. 645, were cases of that character. * * It is very clear that upon common law principles the owner would not be liable for an injury sustained by one of such employees by reason of the negligence of one of his co-employees, whatever his grade in the common employment. In the recent case of *Railroad Co. vs. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, Adv. Sup. S. 85, 44 L. Ed.

181, where the case of *Railroad Co. vs. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, was fairly and squarely overruled, the Supreme Court announces the true rule to be, both upon principle and authority. 'That the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption as they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end'" (p. 576).

In *The South Portland*, 111 Fed. 767, (D. C. Washington, N. D. 1901), Judge Hanford held the vessel liable for the wrongful imprisonment of a seaman by the master, in violation of the Act of December 21st, 1898.

Dorrell vs. Schwerman, 111 Fed. 209, (D. C. Wisconsin, 1901) is another case of an assault committed by a master.

In *The Eva B. Hall*, 114 Fed. 755, (S. D., N. Y. 1902) suit was brought against the vessel

to recover for failure of the master to treat a seaman who had been injured through an assault committed by the mate. Judge Adams, in the course of his opinion, said:

> "The mate has disappeared, but the libellant does not seek to hold the vessel for the original injury, nor does the vessel claim that the blow was justified in any way. It is assumed by the parties, for the purpose of this action, that there was no fault on the part of the libellant or of the vessel, as far as the blow is concerned, but the libellant complains that, instead of thereafter receiving the care he was entitled to from the vessel, the master wrongfully compelled him to work during the whole of the remainder of the voyage, a period of eleven days, threatening to place him in irons unless he should do so. * * *"

Accordingly, while no recovery was allowed for the assault, the vessel was held liable for the failure of the master to treat the seaman after he had been wounded. Cited with approval in *The Cuzco*, 154 Fed. 177 (C. C. A. 2nd, 1907).

In *The Lizzie Burrill*, 115 Fed. 1015, (D. C. Alabama, 1902) Judge Toulmin held the vessel liable for an assault committed by the master upon a seaman, on the theory that the master of the vessel was the owner's representative

to enforce the owner's obligation of decent and humane treatment to seamen. He stated, page 1016:

> "The weight of evidence clearly shows not only bad treatment, consisting of assaults and beating, by the third mate and the boatswain, but by the master himself. The master's personal violence does not appear to have been so frequent or continuous, but it does appear that he not only did not protect the libellant from the bad treatment and from violences committed by the mate and boatswain, of the mate particularly, which it seems was continuous and persistent, but that he on more than one occasion at least encouraged it with his acts of omission as well as commission, and which were more frequent, were a breach of duty on his part, for which, in my judgment, the vessel is liable."

This case is correct.

Johnson vs. Mowatt, 115 Fed. 844, (E. D. Pennsylvania, 1902), McPherson, *D. J.* This was an action by a seaman against the master. Libellants refused to work while the master was ashore. When he returned, he demanded why, and was told one was sick and another wanted a safer ship, etc. Havana being under military law, the master requested permission of the military authorities to discharge libellants. This was refused, but the military au-

thorities arrested the men. When brought back aboard ship, the mate put one of the men in irons, in the absence of the master. The action was brought to recover for alleged false imprisonment. After discussing the act of December 21st, 1898, forbidding imprisonment, the Court held:

> "Assuming this to be correct, the question still remains whether the present respondent is liable, and upon this point the testimony satisfies me that neither the imprisonment on shore nor the punishment on board the ship was inflicted by the direction or at the request of the master. * * * It nowhere appears that the action of the mate in putting Johnson in irons for a few hours after his return to the vessel was ordered by the captain, or that he was present when it was done. I see no ground, therefore, upon which the respondent can be liable" (p. 845).

Memphis & Newport Packet Co. vs. Hill, 122 Fed. 246, (C. C. A. 8th, 1903). This was an action by a seaman for an assault committed by the captain of the watch, who was appointed by the mate acting as master, to supervise shifting some cargo on the vessel. The lower Court found that the assault was committed without any provocation for the purpose of compelling the libellant to work more rapidly. Judge Thayer, writing for the Circuit Court

of Appeals, said, page 247:

"The case presents but one question of law for determination by this tribunal, and that is whether the appellant can avoid liability by virtue of the familiar doctrine that a master is not liable for one of his servants in consequence of injuries sustained by reason of the negligence of another servant. This doctrine is invoked by learned counsel for the appellant, and they seek to make it applicable to the case in hand; citing in support of their contention *Alaska Mining Co. vs. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42, L. Ed. 390; *Tuttle vs. Milwaukee Ry.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, and *The Antonio Zambrana* (D. C.) 89 Fed. 60.

"These cases, to which our attention is especially invited enunciate nothing more than the familiar doctrine of the common law that where two persons stand to each other in the relation of fellow servants of a common master, neither can hold the master responsible for injuries sustained in consequence of the negligent act of the other. But this doctrine, we think, has no application to the case at hand. The injuries complained of by the libellant were not occasioned by the negligent act of Wright while he and the libellant were working side by side as fel-

low servants, but they were willfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that office had the same power to give orders to deckhands and direct them what to do, as the mate. It has been held, and we think with good reason, that where a deckhand is thus selected by the master or mate to act as captain of the watch, and to exercise authority and control over other deckhands, he is for the time being an officer of the vessel or steamer, within the fair meaning and intent of Section 5347 of the Revised Statutes (U. S. Comp. Stat., 1901, p. 6331) which makes it a crime for an officer of an American vessel to willfully beat or wound a member of the crew without just cause. *U. S. vs. Trice,* (D. C.) 30 Fed. 490. It is also a well known rule of law that a master is responsible for a willful assault or trespass, such as the one committed in the present instant, that is, committed by his servant while the latter is immediately engaged in doing the work of the master and is discharging these duties of the master that have been devolved upon him. *Phila. & Reading R. R. Co. vs. Derby,* 14 How, 468, 486, 14 Law Ed. 502, Am. & Eng. Ency. of Law (2nd Ed.), Vol. 2, p. 990, and cases there cited.

"If the mate of the steamer *Orlando*, while urging the crew to do their work more rapidly, had inflicted the blow which broke the appellant's arm, without just cause, the owners of the steamer would doubtless have been liable for the tort (*The General Rucker*, (D. C.) 35 Fed. 152, 157, 158); and no good reason is perceived why the owner of the steamer should not be held liable for the same wrongful act when committed by one who, at the time of the assault, by direction of the mate, who was acting as master, was exercising the authority of the mate and was for the time being an officer. It is doubtless true that a master cannot be held liable for a willful assault which one of his servants commits upon another when they are working together as fellow servants. But if such an assault is committed when, as in the present instance, the one who commits the assault is exercising over the other all the power and authority of the master, and is doing so by his appointment, we know of no reason why the master should escape liability because on some occasions the two men worked side by side as fellow servants" (pp. 247-248).

We think this case is against the weight of authority and is wrong in principle. The case is directly contrary to the decision of the Supreme Court in *The Osceola*. As the *Hill*

case was decided immediately after *The Osceola*, it is doubtful if this case was brought to the Court's attention. As the case was apparently solely based on the doctrine of *respondeat superior* and is in conflict with *The Osceola*, whatever authority it once had is no longer in force. It has only been cited once, and then on question of disturbing finding of fact on appeal. *Perriam vs. Pac. Cast. Co.*, 133 Fed. 140 (C. C. A. 9th 1904),

In *The Astral*, 134 Fed. 1017, (E. D. Penn., 1905), suit was brought by a seaman against the vessel to recover for assault committed by the first officer. The Court held:

> "Assuming these averments of fact to be established by the evidence, the important question arises whether an action against the ship can be maintained for the master's breach of duty. That an action *in personam* would lie against the mate and also against the master cannot be denied, but this does not answer the question just stated. An action *in rem* for a similar neglect of duty was sustained in *The Marion Chilcott*, (D. C.) 95 Fed. 688, and *The Lizzie Burrill* (D. C.) 115 Fed. 1015; but these cases were both decided before the appearance of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and must, of course, give way to the ruling of the Supreme Court."

In *The Sallie Ion*, 153 Fed. 659, (E. D. Penn, 1907) suit was brought against the vessel to recover for an assault committed by the master. Judge McPherson, after holding that the action would not lie *in rem* because of Admiralty Rule 16, also held that under *The Osceola* decision the vessel would not be liable *in rem* for the negligence of the master. The Court said, page 660:

> "Now, surely, if an action *in rem* will not lie to redress an injury caused by the negligence of the master, still less will such an action be permitted where the wrong of the master has been wanton and malicious, an act not even connected with the performance of his duty in the care and management of the ship. In *The Osceola*, the master was engaged in the business of navigating the vessel and negligently gave a wrong order. Here, he was not employed in any branch of his duty but committed the assault on the libellant without provocation or just cause — in other words, wantonly and maliciously. At least in the absence of proof that the master was known to be of violent temper and given to such dangerous outbreaks—and perhaps not even then—there is no reason why the ship should be liable for conduct of this kind, and rule 16 is probably founded on the injustice of making the vessel suffer for a criminal act that is only con-

nected with the ship because it has been committed upon her deck by one of her officers."

The libel was thereupon dismissed.

In *The Vueltajabo*, 163 Fed. 594, (D. C. Alabama, 1908), Judge Toulmin held that the vessel was not liable *in rem* for an assault committed by the master upon one who was employed by the owners of the vessel to navigate a launch when the vessel arrived at the port of destination. He stated in his opinion:

> "But whether libellant was a member of the crew, or rightfully on the vessel as an employee of her owners, being there by their direction or permission, he would be entitled to recover for any injuries cruelly, unnecessarily and improperly inflicted on him by the master. The owners and master would be liable by suit *in personam* in a court of admiralty or by the proper action in a court of common law" (p. 597).

In *Belyea vs. Cook*, 162 Fed. 180, (D. C., N. D. California, 1908), the action was brought for an assault and wages against the master of the vessel. Some of the assaults were committed by the master and some by the mates. Judge DeHaven said, page 182:

> "That this libellant was, upon two or

> three occasions, struck and beaten by the mates of the 'Bowhead'; but this does not appear to have been done with the consent of the master, except perhaps on one occasion, the master witnessed the assault."

Thereupon recovery was allowed only for the assault committed by the master.

In *The David Evans*, 187 Fed. 775 (C. C. A. 9th, 1911) suit was brought by a seaman against the vessel for breach of duty of good treatment, occasioned by reason of the alleged assault committed by the master on the seaman. It was found on the facts that while the master did strike the seaman, it was done to repel an attack in defense of his person. The libel was accordingly dismissed.

In *Wolfe vs. Thomas*, 268 Fed. 464, (C. C. A. 6th, 1920) an action was brought by a seaman to recover damages for an alleged assault committed by the master of the vessel. The decree of the District Court allowing damages was reserved because of error committed by the Trial Court in connection with allowing certain evidence. Judge Donohue, however, recognized the liability of the owner in the following language:

> "It does not appear, however, that the injury sustained by libellant from the assault and battery on the boat was of so light and trivial a nature as to re-

quire the dismissal of the libel. On the contrary, it does appear that he was struck twice with an iron pipe. It is needless to say that these blows must have caused some pain and suffering. This libellant is entitled to recover damages in this action for whatever injury he suffered from the violence inflicted upon him on board the vessel, including such physical and mental pain and suffering as necessarily resulted therefrom" (p. 467).

In the case of *The Rolph*, 293 Fed. 269, affirmed 299 Fed. 52 (C. C. A. 8th, 1925), the vessel was held liable for an assault committed upon a seaman by a mate. Judge Hunt, writing for the Circuit Court of Appeals, held, page 55:

"From these and many other decisions, in which the courts have discussed the duty of the shipowner, we conclude that it is but reasonable to say that a ship is not properly equipped for a voyage, where the mate is a man known to be of a most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors. Such a man may be ever so skilled and competent in navigation and seamanship, nevertheless he is wholly incompetent to fill a

place of authority which calls for the exercise of a sense of natural fairness to men under him. * * * * *

"It is said that the owner does not select the mate, and, therefore, the ship cannot be held, but it is established that while the master of the ship selects the mate, in so doing he is the representative of the owner in respect to the obligation to equip the ship with a competent officer to make her seaworthy, and the duty of the owner in such respect is not one to be delegated, *Rainey vs. N. Y. & P. S. S. Co.*, *supra*, or avoided by the plea that the master did not know the ship was unseaworthy when the voyage commenced. It would follow, therefore, that if the master fails, and by reason of failure the ship is unseaworthy and injuries are done by willful assaults upon a seaman, the owner may be liable. * * * * *

"As already said, the breach on the part of the owner of *The Rolph* was the failure to supply a properly equipped ship. There was unseaworthiness, and, therefore, recovery may be had for injuries appellees received in consequence of unseaworthiness."

This case is undoubtedly correct.

In the case of *Schooner Robinson*, 1925 A.

M. C. 684 (E. D. Pa. 1925), an action was brought *in rem* to recover for an assault committed by one member of the crew on another member of the crew. Judge Brown said:

> "Counsel for the libellant contends that the instant case is distinguishable in that the present libel was based upon the duty of the owners through the master to maintain proper order and discipline upon the ship, and cites *The Marion Chilcott*, 95 Fed. 688; *The A. Heaton*, 43 Fed. 592; *The Governor Ames*, 55 Fed. 327; *The Lizzie Burrill*, 115 Fed. 1015, and other cases, in which it has been held that an action *in rem* will lie to recover damages for loss or injury arising through the neglect of the duty of the master to maintain the discipline which should govern the conduct of those under his authority. That that is not the law is ruled in *The Osceola*, 189 U. S. 158, where the cases are thoroughly reviewed by Mr. Justice Brown, and at page 175 the Learned Justice summarized the law as settled upon the following proposition: 'That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.' The law thus expressed clearly rules this case and the exceptions are

therefore sustained, and the libel dismissed."

This case we think is correct, as there was apparently no evidence that the assault was committed in the presence of the master or that he ratified it or that he could have prevented it. It is also worthy of note that the Court considered *The Osceola* of binding authority, so far as liability for assault was concerned.

In *Fein vs. United States*, 1925 A. M. C., 552 (D. C. Oregon, 1925), an action was brought by a seaman to recover for an assault committed by an officer other than the master. The Court said:

> "I will not discuss the liability of the ship, because of the understanding I have that the ship is not liable unless it has failed to use due care and precaution in making the ship seaworthy—that is, in respect to employing careful and capable officers, and officers that will conduct the business aboard thereof according to law and the rules and regulations of the Department. So that the ship itself must be relieved of any liability."

The Court proceeded to assess damages against the mate, who committed the assault and who was a joint respondent.

While the Court used the word ship, it must be interpreted to mean owners, as the suit was *in personam*. The case is undoubtedly correct.

We have, perhaps, made an unnecessarily exhaustive survey of the cases on the subject, but there is so much confusion in the law that we thought it advisable to collect all the cases which were available. The cases certainly support petitioners' contention of non-liability for assaults committed by an officer other than the master, where there is no violation of the owners' contractual duty and no ratification of the assault.